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No. 86-1470

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES D. CROWLEY, ET AL., PETITIONERS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals erred in holding that they were not entitled to attorneys' fees under the Equal Access to Justice Act (EAJA or Act), 28 U.S.C. 2412(d), because their case was not "pending" on October 1, 1981, the effective date of the Act.

1. Petitioners brought this suit in 1974 to challenge the legality of certain State Department employment procedures. On May 22, 1980, the district court ruled that petitioners were entitled to mone-

tary relief and attorneys' fees under the Back Pay Act, 5 U.S.C. 5596(b)(1)(A)(ii). The government filed a notice of appeal from this decision, but on September 12, 1980, the appeal was dismissed on the government's motion. Pet. App. 2a.

Petitioners then filed an application for attorneys' fees under the Back Pay Act, which was granted by the district court on September 15, 1981. This award was subsequently reversed by the court of appeals, which held that petitioners were not entitled to fees under that statute. *Crowley* v. *Shultz*, 704 F.2d 1269 (D.C. Cir. 1983). By this time, however, EAJA had come into effect; petitioners therefore returned to the district court and, on June 13, 1983, filed an application for fees under EAJA. The government opposed the application, noting that EAJA authorized fee awards only in cases "pending on, or commenced on or after" October 1, 1981 (Pub. L. No. 96-481, § 208, 94 Stat. 2330), and arguing that this case was not "pending" on that date because only the fee application itself remained unresolved in October 1981. The district court nevertheless held that petitioners were entitled to fees under the Act. Pet. App. 3a.

2. The court of appeals reversed in an opinion by then-Judge Scalia. Under circuit precedent, the court noted, a suit is not "pending" within the meaning of EAJA "when it has been finally resolved on the merits and only collateral issues, like the availability or amount of attorney's fees, remain to be resolved" (Pet. App. 3a (citing *Nichols* v. *Pierce*, 740 F.2d 1249 (D.C. Cir. 1984)). Recognizing this, petitioners argued that their case was in fact pending on October 1, 1981, because, when the government appealed from the September 15, 1981, order fixing attorneys' fees under the Back Pay Act, it

could have appealed the merits of the case as well (see Pet. App. 3a-4a).[1] The court noted that this argument turned on what it termed the questionable proposition that a case is "pending" on EAJA's effective date so long as an appeal on the merits *could* have been brought in October 1981, even if no appeal was in fact brought (*id.* at 4a-5a). But even granting that proposition, the court held that the merits decision in this case could *not* have been challenged in an appeal from the subsequent order resolving only attorneys' fee issues (*id.* at 5a).

While the court noted that the question whether an order finally resolving the *merits* of a case may be challenged in an appeal from a later order resolving attorneys' fee issues "was once the source of substantial confusion and disagreement among the federal courts" (Pet. App. 5a), the court of appeals concluded that the issue had been resolved by this Court's decision in *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982). That decision, the court of appeals explained, recognized that requests for attorneys' fees are "separate from and collateral to judgments on the merits," and for that reason "can have no effect on the finality (and

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[1] As the court of appeals summarized petitioners' argument: "the District Court's order of May 22, 1980, left unresolved the amount of the attorney's fees award to which it held [petitioners] were entitled under the Back Pay Act. Since that order did not dispose of the 'whole case,' [petitioners] reason, it was merely 'collateral,' and the government could have appealed the merits of the case for sixty days after the date on which the amount of the award was fixed (and thus the 'whole case' decided). Since the amount of the award was fixed on September 15, 1981, they conclude that this suit was pending on October 1, 1981, the effective date of the EAJA." Pet. App. 4a.

thus the appealability) of a judgment finally disposing of the merits of a case" (Pet. App. 7a).

The court of appeals also rejected the suggestion that, under the decision in *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976), a request for attorneys' fees is not collateral if it is made in the complaint, rather than in a post-judgment motion. The court of appeals found "nothing in [this] Court's remarks [in *Liberty Mutual*] that constitutes even a remote indication (much less a holding)" that fee requests made in a complaint are not collateral to the merits (Pet. App. 10a), and the court of appeals noted this Court's subsequent conclusion in *White* that " '[*r*]*egardless of when* attorney's fees are requested,' they are separate from and collateral to the judgment on the merits" (*id.* at 12a (quoting 455 U.S. at 451) (emphasis added by the court of appeals)). The court of appeals also noted that a distinction based on the timing of the fee request "has no basis in logic or policy" (Pet. App. 12a). The court therefore held that the May 1980 order in this case, which disposed of the merits of petitioners' claim, had been final and immediately appealable; as a result, the court held that on October 1, 1981, "no appeal of that order was pending and the time to bring such an appeal had long passed" (*id.* at 14a).[2]

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[2] Judge MacKinnon dissented (Pet. App. 15a-30a). Relying on *Liberty Mutual*, he reasoned "that finality of judgment for purposes of appeal is to be determined on the basis of what was included in the plaintiff's prayer for relief" (*id.* at 24a). Because petitioners sought attorneys' fees in their 1974 complaint, Judge MacKinnon concluded that an appeal on the merits could have been taken after the district court's September 1981 order determining the amount of fees under the Back Pay Act (*id.* at 25a).

3. a. Petitioners contend principally (Pet. 6-9) that the Court should grant review here to resolve a conflict in the circuits on the question whether a case was "pending" within the meaning of EAJA on October 1, 1981, when only a request for attorneys' fees was unresolved on that date.[3] But this question is of no continuing importance. Resolution of the issue can affect only cases that were resolved on the merits prior to 1981, but that are still in litigation over the availability of attorneys' fees. So far as we are aware, this case is the only one that falls into that category. Indeed, even the dissenting judge below expressly indicated that he would not suggest rehearing en banc because "the proceeding in my opinion does not involve a question of exceptional importance" (Pet. App. 91a (MacKinnon, J., concurring)).

Petitioners nevertheless argue that the issue here may have continuing consequences because 1985 legislation reenacting and amending EAJA (which, by the terms of the 1981 legislation, expired in 1984) also contains a "pending" clause: the 1985 EAJA legislation applies to "cases pending on or commenced on or after [August 5, 1985,] the date of the

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[3] Three courts have held that cases were not "pending" for EAJA purposes when the only issues remaining unresolved on October 1, 1981, concerned the availability of attorneys' fees. See *Tongol* v. *Donovan*, 762 F.2d 727 (9th Cir. 1985); *Nichols* v. *Pierce*, 740 F.2d 1249 (D.C. Cir. 1984); *Commissioners of Highways* v. *United States*, 684 F.2d 443 (7th Cir. 1982). Two courts have held that the pendency of an attorneys' fee request does make a case "pending" for EAJA purposes. *Knights of the Ku Klux Klan* v. *East Baton Rouge Parish School Board*, 679 F.2d 64 (5th Cir. 1982); *United States for Heydt* v. *Citizens State Bank*, 668 F.2d 444 (8th Cir. 1982).

enactment of [the] Act" (Pub. L. No. 99-80, § 7(a), 99 Stat. 186). But the courts of appeals have recognized that the two "pending" clauses—one of which appears in a statute making the United States liable for fees as an initial matter, and the second of which appears in a statute that simply amends and clarifies existing law—are not identical.

This is clearly illustrated by the holdings of the District of Columbia Circuit itself. That court has held, in this case and in *Nichols* v. *Pierce*, *supra*, that an action was not pending within the meaning of the original EAJA when only the fee request remained to be resolved on October 1, 1981. But the court of appeals has also expressly distinguished *Nichols* in holding that a case *is* pending within the meaning of the 1985 reenactment when only the fee question remained unresolved on August 5, 1985. *Center for Science in the Public Interest* v. *Regan*, 802 F.2d 518, 524 n.11 (D.C. Cir. 1986). As Judge Bork explained in voting to deny rehearing in the present case, "[s]trict construction of the EAJA as a waiver of sovereign immunity require[d]" the result in *Nichols*; in contrast, in the 1985 legislation "Congress intended merely to 'clarify' the original EAJA," so that application of that legislation "to pending fee requests in cases whose merits are not pending would not constitute a waiver of sovereign immunity requiring strict statutory construction" (Pet. App. 89a (statement of Bork, J.)). Consideration of this case by the Court therefore could shed no light on the meaning of the 1985 EAJA amendments.[4]

[4] Petitioners suggest (Pet. 8-9) that the circuits are split on the meaning of the term "cases pending" in the 1985 EAJA legislation. Even if this were true, the conflict could not be resolved by the Court's consideration of this case, for the

b. Petitioners also contend that this case was in fact pending on the merits on October 1, 1981, asserting that the district court's May 1980 ruling on the merits was not appealable until that court awarded attorneys' fees in September 1981. In making this argument, petitioners appear to acknowledge (Pet. 10-11) that a *post-judgment* request for attorneys' fees is collateral to the merits, and therefore does not affect the finality or immediate appealability of a decision on the merits. But relying on *Liberty Mutual Ins. Co.* v. *Wetzel*, *supra*, petitioners argue (a) that a decision is not appealable until all of the requests for relief in the complaint have been resolved; (b) that petitioners here sought attorneys' fees in their complaint; so that (c) the government could not have appealed the ruling on the merits until the district court finally resolved the fee request in September 1981. In essence, petitioners contend that, while fees requested by means of a post-judgment motion are collateral to the merits, fees requested in the complaint are not. Pet. 9-13.

As the court of appeals explained, petitioners' distinction—which plainly "has no basis in logic or

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reasons that we explain in text. In any event, the courts in fact have held with near uniformity that a case was pending within the meaning of the 1985 legislation when only the fee request was outstanding on August 5, 1985. See *Center for Science in the Public Interest*, 802 F.2d at 522 (citing cases). Despite petitioners' contention to the contrary (Pet. 9), this is the position of the Ninth Circuit (see *McQuiston* v. *Marsh*, 790 F.2d 798, 800 (1986)), although that court also has held that portions of the 1985 amendments expanding the class of litigants eligible for fees should not be given retroactive effect (see *American Pacific Concrete Pipe Co.* v. *NLRB*, 788 F.2d 586, 590 (1986)). But see *Blackmon* v. *United States*, 807 F.2d 70 (6th Cir. 1986).

policy" (Pet. App. 12a)—is flatly inconsistent with this Court's decision in *White* v. *New Hampshire Dep't of Employment Security, supra.* The Court there held that attorneys' fee requests are collateral to the merits for finality purposes, explaining that when fees are awarded to a prevailing party (as they are under EAJA, see 28 U.S.C. 2412(d)(1)(A)), "[*r*]*egardless of when* [*the*] *fees are requested,* the court's decision of entitlement to fees will * * * require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed' " (455 U.S. at 451-452 (emphasis added)). And the Court noted as well that attorneys' fees cannot "fairly be characterized as an element of 'relief' indistinguishable from other elements" (*id.* at 452).[5]

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[5] As the court below noted (Pet. App. 12a (citing cases)), at least three circuits have held merits judgments to be final and appealable even when they did not resolve requests for attorneys' fees made in the complaint. The only apparent exception to this approach is the Sixth Circuit's decision in *Penland* v. *Warren County Jail,* 759 F.2d 524 (1985) (en banc), which held that a motion to amend judgment seeking an award of attorneys' fees tolled the time for appealing a magistrate's judgment on the merits. *Id.* at 527. We note that there is a significant factual distinction between *Penland* and this case: in *Penland,* the magistrate ruled simultaneously on the merits and the attorneys' fee request. The *Penland* court of appeals found this procedural background relevant, basing its decision in part on the fact that the magistrate "ruled against [the plaintiff] on the attorney's fee issue in the written opinion [disposing of the merits] rather than deferring the question" (*ibid.*). In any event, even if the Court were inclined to consider the propriety of the *Penland* approach to appealability, this case would not present a suitable vehicle. The question in *Penland* (as it is in most cases

This conclusion is hardly inconsistent with *Liberty Mutual*. In that case, the district court granted partial summary judgment to the plaintiffs on the question of liability, but did not determine what relief should be awarded. The court then certified its decision as final pursuant to Fed. R. Civ. P. 54(b), which permits such certification when the judgment is final as to one but not all of the claims involved in the case. This Court held the certification improper, explaining that, while the plaintiffs had sought a number of different types of relief, those requests were based on one indivisible claim. 424 U.S. at 742-744. The Court also noted that the district court's order was not appealable under 28 U.S.C. 1291 because it did not dispose of all of the plaintiffs' requests for relief; in making that observation the Court listed those requests, including requests for injunctive and monetary relief and for attorneys' fees. 424 U.S. at 742. As the court of appeals noted, there is nothing in this casual language "that constitutes even a remote indication (much less a holding) that the district court's order would not have been appealable under 28 U.S.C. § 1291 had it disposed of all of plaintiffs' prayers for relief except the prayer for attorney's fees" (Pet. App. 10a). And to the extent that there was any ambiguity in the *Liberty Mutual*

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where the collateral nature of an attorneys' fee request is at issue) was whether an appeal on the merits was time-barred. The question here, in contrast, is whether this case was "pending" within the meaning of EAJA on October 1, 1981. These questions, as the court of appeals noted (Pet. App. 4a-5a), are not identical. If the Court is to address the significance of an attorneys' fee request made in the complaint, it would be more useful to do so in a case where the appealability of a merits decision is in fact at stake.

language, it has been resolved by the Court's subsequent decision in *White*.

It is thus clear that the only question remaining open in this case on October 1, 1981, was the availability of fees, a question that was wholly collateral to the merits. The necessary conclusion is that the case was not "pending" on that date within the meaning of EAJA.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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